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Supreme Court of the United States.

OCTOBER TERM, 1899,

No. 298.

ROTHSCHILD & BROTHER,
Appellants,
against
THE UNITED STATES,
Appellee.

On a Certificate from the United States Circuit Court of Appeals from the Second Circuit.

BRIEF FOR THE UNITED STATES.

(No. 17,412).

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BRIEF FOR THE UNITED STATES.

I.—The certificate states the facts.

II.—The two questions submitted should both be answered in the affirmative.

1. It is the meaning of the Tariff Act of July 24, 1897, to subject to different rates of duty the leaves of tobacco suitable for cigar wrappers and those not suitable when mixed in the same commercial bale or package.

2. It is the meaning of said act to subject to the duty of $1.85 per pound the leaves of tobacco suitable for cigar wrappers intermingled in the bales or packages of tobacco (unstemmed) of the description which, in their entirety, at the date of the enactment, were commercially known in this country as "filler tobacco," and bought and sold by that name, notwithstanding such leaves constitute less than fifteen per centum of the contents.

The Law.

The law under which the Collector justified his proceedings is known as the Dingley Tariff Act of July 24th, 1897, and the paragraphs of that law applicable to duties on tobacco are as follows:

213. Wrapper tobacco, and filler tobacco, when mixed or packed with more than 15% of wrapper tobacco, and all leaf tobacco, the product of two or more countries or dependencies, when mixed or packed together, if unstemmed, $1.85 per lb.; if stemmed, $2 per lb.; filler tobacco not specially provided for in this act, if unstemmed, 35c. per lb.; if stemmed, 50c. per lb.

214. The term wrapper tobacco, as used in this act, means that quality of leaf tobacco which is suitable for cigar wrappers, and the term filler tobacco means all other leaf tobacco.

Collectors of Customs shall not permit entry to be made, except under regulations to be prescribed by the Secretary of the Treasury, *of any leaf tobacco*, unless the invoices of the same shall specify *in detail* the character of such tobacco, whether wrapper or filler, its origin or quality.

In the examination for classification of any imported leaf tobacco, at least one bale, box

or package in every ten, and at least one in every invoice, shall be examined by the Appraiser or person authorized by law to make such examination, and at least ten hands shall be examined in each examined bale, box or package.

215. All other tobacco, manufactured or unmanufactured, not specially provided for in this act, 55c. per lb.

(For brevity figures have been used and "per lb." substituted for the written words in the text of the act).

The Decision Appealed From.

The General Appraisers, by a divided court, overruled the action of the Collector, and held that because the per cent. of wrapper tobacco in each bale was less than 15%, the Collector should have ignored the presence of wrapper tobacco in the bales, and entered them as bales of filler tobacco, subject only to an impost duty of 35cts. per lb.

This decision was reversed by the Circuit Court, and from the latter decision the appeal to the Circuit Court of Appeals was taken by the Importers.

On the Construction of Statutes.

At the outset it is proposed to discuss some elementary principles governing the construction of statutes, and then to take up the history of tariff legislation and the decisions of the courts, from 1883 until the enactment of the present law, on the subject of leaf tobacco.

Says the Supreme Court of the United States, in U. S. *v.* Union Pacific R. Co., 91 U. S., 72:

> "Courts, in construing a statute, may, "with propriety, recur to the history of the

> "times when it was passed; and this is fre-
> "quently necessary in order to ascertain the
> "reason as well as the meaning of particular
> "provisions in it."

In the case of U. S. *v.* Oregon and C. R. Co., 57 Fed., 426, it was said that

> "in construing a statute the courts may
> "advise themselves as to the history of the
> "times and the general state of public, judi-
> "cial and legislative opinion of that period."

Says the Court of Appeals of New York, in People *v.* Supervisors Columbia Co., 43 N. Y., 130:

> "The occasion of the enactment of a law
> "may also be referred to in interpreting and
> "giving effect to it. The Court should
> "place itself in the situation of the Legis-
> "lature and ascertain the necessity and prob-
> "able object of the statute, and then give
> "such construction to the language used as
> "to carry the intention of the Legislature
> "into effect, so far as it can be ascertained
> "from the terms of the statute itself."

The Supreme Court of Louisiana, in the case of John Lake, Sh'ff, *v.* Parish Coddo, 37 La Annual, 788, held, that whenever light can be derived from such sources, the courts will take judicial notice of the facts of contemporary history, the prior state of the law, the particular abuse or defect which the act was meant to remedy, and the application of such state of affairs to the language which it employs. They will also, for this purpose, inform themselves as to such facts and circumstances by any and all available means.

The Supreme Court of Vermont, in Barker *v.* Esty, 19 Vt., 131, went so far as to declare that a known state of embarrassment resulting from the former law might be considered in determining the intention of the Legislature in enacting a statute.

Thus we have the Federal court of last resort; the State courts in New England and New York, where the common law prevails; and of Louisiana, where the civil law is the basis of their jurisprudence; all concurring upon the proposition.

It has been held that the rule of construction by the aid of prior statutes in *pari materia* is especially applicable in the case of revenue laws, which, though made up of independent enactments, are regarded as one system, in which the construction of any separate act may be aided by the examination of other provisions which compose the system.

U. S. *v.* Collier, 3 Blatch., 325.
In re So. Pac. Co., 82 Fed., 311-313.
Black on Interpretation of Statutes (1896), 206.

It is also true that in seeking the correct meaning of words and terms employed in an act to be construed, resort may be had to rulings upon former acts in *pari materia*, although they may have expired or been repealed. But it must be borne in mind always that this broad principle has certain limitations.

The elementary works and the cases cited in support of this general principle show clearly that, in announcing that expired and repealed acts in *pari materia* with the act to be construed, may be considered by the courts in seeking the correct meaning of words and terms employed in the act to be construed, the writers had particularly in view the general body of legislative enactments rather than those laws which formulate the governmental or revenue policy of a political party in power for the time being. Such laws are to be construed, rather by study of contemporaneous events, their reason and spirit, and in the light of the ascertained policy and purpose of their framers, than by reference to the language of statutes repealed by them, or

passed by others whose policies and purposes were antagonistic to, and have been overthrown by, the framers of the act to be construed.

The discussions of this subject by Maxwell and Black make it plain how dangerous it is, in seeking a true interpretation of the revenue measures of one political party, to "stick in the bark" of other and prior statutes, which, while they may relate to the same subject and are technically in *pari materia* (7 Com., 456), were framed with a different motive, purpose and meaning by an opposition party. For example, Black says, p. 504:

> "Later statutes are considered as supplementary or complementary to the earlier enactments. In the course of the entire legislative dealing with the subject we are to discover the progressive development of a uniform and consistent design, or else the continued modification and adaptation of the original design, to apply it to changing conditions or circumstances. * * * Secondly, the rule derives support from the principle which requires that the interpretation of a statute shall be such, if possible, as to avoid any repugnancy or inconsistency between different enactments," &c.

Maxwell (p. 46), treating of the same subject, says:

> "Where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purpose of construction, considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs."

Both writers, in their illustrations of the general principle and the reason for its existence, show

plainly that its application was chiefly considered by them with reference to non-political laws, as contradistinguished from those embodying the legislative policy of a dominant political party.

Touching the former, we may reasonably expect, in new laws, provisions supplementary or complementary to earlier enactments. So also may we expect to find the progressive development of a uniform and consistent design; and concerning such, it is correct to apply the principle which seeks to avoid repugnancy or inconsistency between enactments. So, too, concerning the former class of laws, we should, for purposes of construction, consider them as forming one homogeneous and consistent body of law, each explaining and elucidating every other part of a common system.

But when it comes to construing the latter class of enactments, how absurd such canons of construction are.

Are the high-tariff measures of one political party to be construed by the free-trade enactments of another party, under the theory that they are in *pari materia?*

Is the one supplementary or complementary of the other?

Is the one the progressive development of the uniform and consistent design of the other?

Are we to seek to avoid repugnancy and inconsistency between the different enactments? Are we to consider the two as forming one homogeneous and consistent body of law, each explaining and elucidating every other part of a common system? If so, we are engaged in the task of "reconciling irreconcilables," and will soon reach an absurd result.

Why not recognize the indisputable fact that such legislation instead of being consonant with, or in furtherance of, the antecedent law, is more frequently opposed to it in spirit, in purpose and in language.

But, above all, let us not, in our anxiety to construe statutes by the language of other statutes in *pari materia*, lose sight of the well known principle governing statutory construction that. "Where "the language is sufficiently plain, the courts, in "construing that language, especially when they "know the purposes of the law-making power, "are bound to give the language the effect it was "intended to have."

Says Black:

> Although a statute "may be one of a series "or group, it may still be that the Legislature designs to depart from the general "purpose or policy of its previous enactments on the general subject; and if such "a design is unmistakably apparent on the "face of the act, it must be given effect. It "would be entirely erroneous in such case "to defeat the will of the Legislature by undertaking to reconcile the act with prior "statutes, or to control its terms by theirs. "Hence this rule of construction is to be "resorted to only in cases of doubt or ambiguity, or where the words, in their ordinary and *prima facie* signification, would "raise an undesigned conflict with previous "laws. It is not applicable when the statute is plain and unambiguous, and needs "no such aid to reconcile it with the existing body of laws.
>
> "In such cases there is no occasion to resort to any extrinsic circumstances to determine the meaning of the statute, nor is "it justifiable to do so. The Legislature "must be understood to have expressed its "meaning in the words employed. It would "be a perversion of the rule to apply it for "the purpose of defeating the plainly expressed will of the legislative body. And

"although statutes relating to the same "subject are to be construed together, this "rule does not go to the extent of control- "ling the language of subsequent statutes by "any supposed policy of previous ones."

Black on Interp. of Laws (1896), p. 209, and cases cited:

"If the language of the statute is plain "and free from ambiguity, and expresses a "single definite and sensible meaning, that "meaning is conclusively presumed to be "the meaning which the Legislature intended "to convey. In other words, the statute "must be interpreted literally."

Black on Int. of Laws (1896), p. 36, and cases cited:

"In the construction, both of statutes "and contracts, the intent of the framers "and parties is to be sought *first of all* in "the words employed, and if the words are "free from ambiguity and doubt, and ex- "press plainly, clearly and distinctly the "sense of the framers of the instrument, "there is no occasion to resort to other "means of interpretation. It is not allow- "able to interpret what has no need of in- "terpretation, and when the words have a "definite and precise meaning, to go else- "where in search of conjecture in order to "restrict or extend the meaning" (*Ibid.*, pp. 36, 37).

"When an act is expressed in clear and concise terms, and the sense is manifest and leads to nothing absurd, there can be no reason not to adopt the sense which it naturally present. To go elsewhere in search of conjectures, in order to find a different meaning, is not so much to interprete the statute as to elude it" (Vattel L. N. Bk., 2, c. 17, s. 263).

"The object of interpretation is to bring sense out of the words used, and not to bring a sense into them" (McCluskey *v.* Cornwall, 11 N. Y., 593-601).

So much for the present concerning construction by reference to statutes in *pari materia*.

Having thus laid the foundation for enquiry into the history of this tariff legislation, and having shown that there are some circumstances under which reference to the language of or decisions under statutes in *pari materia* are unnecessary, dangerous and even absurd, let us now examine the acts, their legislative and judicial history, the language of the present law, and its ordinary meaning, and whether that meaning is to be interpreted away by the construction placed upon the language of other acts which are brought in by visionary theories of "*pari materia*."

How the Statute is to be Construed.

Tariff laws in general, and the law in question in particular, according to many decisions of the Federal courts, are not subject to a restrictive interpretation. but should be construed with fairness and justice, and in a manner such as to make them accomplish the purpose designed.

Revenue laws are not considered as penal statutes to be construed most strongly against the Government and in favor of the citizen.

Black on Interp. of Laws, (1896), pp. 329-30

They should be construed in such a manner as most effectually to accomplish the intention of the Legislature in enacting them (Taylor *v.* U. S., 3 How., 197-210).

Cliquot's Champagne, 3 Wall., 114.

Legislative intention is the guide to true judicial interpretation.

2 Abb. U. S., 305; 7 Blatchf., 459; 2 Bened, 63; 1 Abb. U. S., 275; 6 Biss., 379; Crabbe, 356, *Ib.* Fed. cases No. 16, 563; 5 Bened, 220; 133 U. S., 1; 10 Wal., 395, 406; 23 Wal., 374, 380.

The History of the Tariff Acts Since 1883, Concerning Tobacco.

The Act of 1883 (U. S. Stat. at Large, Vol. 22, p. 488, Mch. 3d, 1883, p. 503) imposed duties on tobacco as follows:

246. Leaf tobacco of which 85% is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, 75c. per lb.; if stemmed, $1 per lb.

247. All other tobacco in leaf, unmanufactured, and not stemmed, 35c. per lb.

Tobacco, manufactured, of all descriptions, and stemmed tobacco, not specially enumerated or provided for in this act, 40c. per lb. Snuff and snuff flour, manufactured of tobacco, ground, dry or damp, and pickled, scented or otherwise, of all descriptions, 50c. per lb. Tobacco, unmanufactured, not specially enumerated or provided for in this act, 30% *ad valorem.*

It will be observed that in this act there was no reference to "fillers." Nor was any tobacco designated as "wrappers" *eo nomine.* Leaf tobacco was divided, for taxation, into classes, viz.:

1. Leaf tobacco of which 85% was of requisite size and of *necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves were required to weigh a pound.*

2. All other tobacco in leaf, unmanufactured and not stemmed.

3. Tobacco manufactured of all descriptions, and stemmed tobacco, not specially enumerated.

It was the manifest purpose to tax leaf tobacco, and that of the finer grade, high. The law was clumsily drawn. The first question left open was, How is the 85% referred to in the first classification to be determined?

The question was first reached in the Supreme Court of the United States, 1890, November 24th.

Falk *v.* Robertson, 137 U. S., p. 225.

Then it was that the Supreme Court, construing the act of 1883, gave definitions of wrappers, fillers and binders (p. 231):

"Wrappers" are leaves suitable for the outside finish of a cigar.

"Fillers" are leaves that make up the main body of the cigar.

"Binders" are the secondary or inside wrapper and hold together the loose material which constitutes the filling.

It is important to note that two months prior to this judicial definition of the different grades of leaf tobacco, in litigation arising under the act of 1883, a new tariff law had been enacted. It was passed October 1st, 1890, and is known as the McKinley law. In due time we will examine its provisions. It is only proposed now to call attention to the fact that even the McKinley law did not designate leaf tobacco as "wrapper" or "filler." It only spoke of "*leaf tobacco suitable for cigar wrappers*" as taxable at one rate, and "all other tobacco in leaf, unmanufactured," as subject to another rate. Until Falk *v.* Robertson was decided in November, 1890, the terms "wrapper" and "filler" were not used in the tariff acts; for indeed, there was no authoritative statement of the meaning of those terms.

In Falk *v.* Robertson, the Supreme Court, construing the act of 1883 and its indefinite phraseology, not only determined the meaning of the terms above referred to, but went further. It declared that prior to the passage of the act of 1883 the various grades were applied to different uses; were bought and sold under their several names, and were of different value in the market, "*and prior to that time bales of leaf tobacco in the trade were as a rule homogeneous as to their contents, each one consisting of only one of these three classes.*"

This is an important historical fact which must be borne in mind. If bales were packed prior to the tariff act of 1883, so that, as a rule, their contents were homogeneous; and if, after the act, importers began to intermingle grades in packing, was there a reason for it connected with the tariff? That such was the fact was demonstrated in the case then before the Court.

Congress, in its effort to reach the high grade of leaf tobacco and tax it at a high rate, an effort apparent in all the tariff acts of this country, England and other countries, declared, in the act of 1883, "Leaf tobacco, of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound," should pay the high rate, and all other tobacco in leaf, unmanufactured and not stemmed, should pay the lower rate.

This language was evidently based upon knowledge that up to that time the bales of leaf tobacco in the trade were as a rule homogeneous as to their contents, each one consisting of leaf tobacco of its class.

The lawmaker evidently failed to realize the invitation he gave importers to blend a little over fifteen per cent. of the lower grade with a little less than eighty-five per cent. of the higher grade, and there-

by escape a tax of $40 on every one hundred pounds imported.

The importer promptly accepted this invitation, and made the issue in the Falk case, which was the first decided. Bales of leaf tobacco, consisting exclusively of high grade wrappers shipped to Holland, were opened in Holland, low grade tobacco to about seventeen per cent. of the total contents of the bales were inserted in layers, in Holland, and the bales, thus composed, were imported into the United States, the importers claiming that, as the bales contained less than 85% of the higher grade, they should only be assessed at the lower rate. In the argument of this case in the court below, counsel for the importers, ignoring the facts in the Falk case, said that the importers had nothing to do with the way in which tobacco was packed, and that the packing was done on plantations without regard to importation. The device was, of course, not sustained. But the pendency of a suit, based upon this contention, must have been known to the framers of the law of October 1st, 1890, and the language of that law, when we come to consider it, must be construed in the light of the knowledge of this and other suits, possessed by the framers of the law of 1890.

The Supreme Court, in Falk *v.* Robertson, not only defined wrappers, fillers and binders and decided against the importers, but in construing the law of 1883, used the following language:

> "They (plaintiffs) contend that the unit upon which the 85% is to be calculated is the entire bale. But we cannot agree with this view. *The statute does not refer to tobacco in bales. It does not say that the 85% is to be 85% of the contents of a bale, but the duty of 75c. per lb. is imposed on any quantity of leaf tobacco* of the specified quality and weight, if not stemmed.

"The unit of the statute, therefore, must be held to be leaf tobacco wrappers answering the description which, when reaching the named percentage, is subject to the duty of 75c. per lb.

"There is nothing in these provisions" (of the act of 1883) "which shows that the 85% in question is to be regarded as meaning 85% of the entire contents of a package containing separable and separated quantities of leaf tobacco of two different qualities and subject to two different duties" (p. 233).

Two months before this decision the McKinley bill was passed, making a radical change in the law, but before taking it up let us consider other decisions under the law of 1883 in cases which arose before its repeal.

For the purposes of this argument they may be considered as if they had all been rendered before the act of 1890 was passed.

In April, 1893, the Circuit Court of the United States, Southern District of New York, decided the case of United States *v.* Blumlein, LV Fed. Rep., p. 383; S. C., 5 C. C. Rep., p. 142. In this case the importers had profited by their experience in the Falk case, and had blended the high and low grade tobacco in the bales imported.

The decision turned upon the method of classification, under the act of 1883, of tobacco thus blended in the bales. The decision rendered, while it has no application to the case, as I shall endeavor to demonstrate hereinafter, is, in my humble judgment, irreconcilable, either in argument or in conclusion, with that in the Falk case.

In the Blumlein case it is said that the statute "plainly contemplated the importation of tobacco in mixed grades, although the Supreme Court had said in the Falk case, 'Prior to that time (the pas-

sage of the act of 1883) bales of leaf tobacco in the trade were, as a rule, homogeneous as to their contents, each one consisting of only one of these three classes.'"

In the Blumlein case the Circuit Court said: "*The tariff does not impose the higher rate of duty upon all tobacco of the requisite size, fineness and weight*, but upon tobacco of which 85% is of the higher grade," although the Supreme Court, in the Falk case, had said, "*The duty* of 75c per lb. *is imposed on any quantity of leaf tobacco of the specified quality and weight.*"

In the Blumlein case the Circuit Court said that the bale was the proper unit on which to regulate the rate of duty by the ascertainment of the percentage of higher and lower grades of tobacco *in a bale*, although the Supreme Court, in the Falk case, speaking of the same act, said,

> "*They* (*plaintiffs*) *contend that the unit* upon which the 85% is to be calculated *is the entire bale*, *But we cannot agree with this view.* The statute does not refer to tobacco in bales * * * *the duty* * * * *is imposed on any quantity of leaf tobacco of the specified quality and weight, if not stemmed.* The unit of the statute, therefore, must be held to be leaf tobacco wrappers, answering the description which, when reaching the named percentage is subject to the duty" (p. 233).

In November, 1894, the Supreme Court of the United States again construed the act of 1883.

Erhardt *v.* Shroeder, 155 U. S., p. 124.

On p. 132 the Court said:

> "Diverse views were entertained * * * whether the bale was to be treated as the

unit to which the percentage test was to be applied, or whether the characteristics of the tobacco were to be ascertained by examining a number of representative hands, * * * and if certain of the examined hands should be found to be dutiable at one rate and the others at a different, the bale should be assumed to contain tobacco of two different grades, and the duties laid accordingly. *The proper answer to this question seems to depend upon the particular circumstances of a given case.*

It appears in the testimony on both sides of this case that leaf tobacco is divided into two classes, known as the wrapper class and the filler class.

Whether or not a bale of tobacco is of uniform character seems to be easily ascertained. If, then, *a bale* or other separate and concrete quantity of leaf tobacco, *contained only leaves of such uniformity of character as to be, in their collective form, of one class, the bale or other separate collection would be the unit.* * * *

On the other hand, if the bale contained tobacco of two classes, the unit would be the ascertained quantity of either class."

Particular attention is called to this language of the Supreme Court, used deliberately and in full knowledge of the language of the Circuit Court in the Blumlein case.

And attention is called to it in connection with the language of the majority of the General Appraisers in this case.

P. 3: "The courts have held that, under paragraphs 246 and 247 of the tariff act of 1883, above cited, that the unit of leaf tobacco, for dutiable purposes, as 'wrapper'

> or 'filler,' was the commercial bale." And again,
>
> P. 5: "The 'commercial bale' of leaf tobacco, honestly packed, is still the unit for dutiable purposes."

Is it true that any courts have held, under the paragraphs referred to, that the unit of leaf tobacco, as "wrapper" or "filler," was the commercial bale?

We have already demonstrated that the classification of leaf tobacco as "wrapper" or "filler" was not made in the Act of 1883, or even in the Act of 1890, or until the Act of 1894. The language used is therefore inaccurate in so far as it describes any court as measuring "wrapper" or "filler" tobacco by the bale as a unit.

It is not less inaccurate in its statement that *the courts* have held, under paragraphs 246 and 247 of the Act of 1883, that the unit of leaf tobacco, for dutiable purposes, was the commercial bale."

What courts are *the courts?* Surely the Supreme Court is *the court*, if any court is such. When and where has *it* held that, under paragraphs 246 and 247 of the Tariff Act of 1883, the unit of leaf tobacco for dutiable purposes is the bale? In the Falk case it rejected in terms the contention of the importers that, under the Act of 1883, the bale was the unit. In the Shroeder case, which is its last expression on the subject, it referred to the diverse views on the question whether the bale was to be treated as the unit, and concluded that, if the bale contained only leaves of uniform character, it would be the unit, but that if it contained tobacco of two classes, "the unit would be the ascertained quantity of either class."

In the presence of statements so boldly made, it is well to examine this decision in Erhardt *v.* Shroeder, for the Supreme Court in that case, in

general and in detail, repudiated the construction placed upon the act by the Circuit Court in the Blumlein case.

In Erhardt *v.* Shroeder the Supreme Court decided that where ten hands of leaf tobacco were taken from a bale for examination, it was essential, in order to assess the tax upon wrappers, that, for every pound of leaf tobacco contained in such hands, there must be at least one hundred leaves. If the examination showed that the ten hands weighed four pounds, there must be contained therein at least four hundred leaves in order to bring the tobacco under the wrapper class as to the weight required by paragraph 246 of the Act of March 3, 1883.

The Court also held that if the whole ten hands were opened and examined, leaf by leaf, and it was found that eighty-five half leaves, out of every one hundred half leaves, contained in this mass were suitable for wrappers (that is to say, that each half leaf will make at least one wrapper), then the whole mass was dutiable as wrapper tobacco under the requirements of paragraph 246 as to size and fineness of texture.

The Court further held that if the ten hands weighing four pounds, contained four hundred leaves, of which more than 85 per cent. of the half leaves were suitable for wrappers (that is to say, that out of the 800 half leaves, 680 or more are suitable for wrappers), then all of said ten hands were to be classed as wrapper tobacco within the meaning of paragraph 246, and the entire lot, or the ten bales that these ten hands represent, were dutiable as wrapper tobacco at the rate of 75 cents per pound.

In the Shroeder case, the examined bale (being a representative bale out of a lot of ten bales) weighed 179 pounds, 125 of which were classified as wrapper tobacco at 75 cents per pound, and the re-

maining 54 pounds as filler tobacco at 35 cents per pound, the percentages being in this case 70 per cent. of wrapper and 30 per cent. of filler tobacco. It was contended on behalf of the importers that, inasmuch as the bale did not contain 85 per cent. of leaf tobacco suitable for wrappers, the whole bale was only dutiable at the 35 cent rate. This claim was in accordance with the ruling of the United States Circuit Court of Appeals in the Blumlein case, wherein the Court held that the bale was the unit, and that unless 85 per cent. of the tobacco contained in the bale was suitable for wrappers, the whole bale was only dutiable at the rate of 35 cents per pound. The Supreme Court flatly overruled this construction, holding that inasmuch as the importers had failed to prove, by competent testimony, that for every pound of leave tobacco contained in said bale of 179 pounds there were *not* more than 170 half leaves suitable for wrappers, every pound of which contained at least one hundred whole leaves, the high rate must be paid.

In this connection it must be remembered that it was the practice in examining leaf tobacco to take ten hands, which were examined separately, hand by hand, for the purpose of ascertaining whether 85 per cent. thereof was suitable for wrappers, and of which it required 100 leaves or more to weigh a pound. It was not the practice, as suggested by the Supreme Court in the Shroeder case, to separate the hands (that is to say, to cut them open), so as to have but one general collection of leaves, under examination. To have cut open the separate hands would have injured them commercially. The examining officer, therefore, made his examination, hand by hand, so that if seven hands out of the ten hands were found to contain leaf tobacco suitable for wrappers, meeting the requirements of paragraph 246, and the remaining three hands to contain leaf tobacco not fulfilling the

wrapper requirements, then seven hands would be classified as wrapper tobacco and three hands as filler tobacco; and, therefore, if the ten hands represented one bale out of ten, 70 per cent. of the bale was classified as wrapper and 30 per cent. as filler, so that if the one bale contained 100 pounds, 70 pounds thereof were charged with duty at 75 cents per pound, and the remaining 30 pounds assessed for duty at 35 cents per pound.

As was stated by the Supreme Court, in the Shroeder case, it does not follow that because the Appraiser's return showed that the examined bale in that case contained 125 pounds of wrapper tobacco and 54 pounds of filler tobacco, being 70 per cent. and 30 per cent. respectively, that not more than 85 per cent. of half leaves were of the requisite size, fineness of texture and weight, to come within the description for wrapper tobacco as contained in paragraph 246. In fact, it was admitted by the importer in that case that out of five bales covered by that suit, more than 85 per cent. of the leaves were suitable for wrapers.

What courts did the General Appraisers refer to then, when they used the language above quoted?

The only other decision upon the subject is another decision of the Circuit Court for Southern District of New York, rendered March 5th, 1895.

United States *v.* Rosenwald, 67 Fed. Rep., p. 323.

This case is only valuable as showing a hopeless effort of the Circuit Court to reconcile its decision in the Blumlein case with the decisions of the Supreme Court in the Falk and Shroeder cases, and to maintain the bale as the unit under the Act of 1883 in the face of the decisions of the Supreme Court to the contrary.

Let it be remembered that all these decisions and all this conflict arose on the construction of the

Act of 1883, and the peculiar phraseology of that Act. There are no decisions, save by the General Appraisers, on the question of what is the unit under the three subsequent acts. How loose, therefore, is the language of the opinion: "The courts have held * * * * that the unit * * * was the commercial bale." And as every one of these cases arose under, and only considered, the Act of 1883, the language of which is different from that employed in three subsequent tariff laws not construed, what warrant is there for assuming, as was done by the General Appraisers, that the "commercial bale" of leaf tobacco "ever was," or "is still," the unit for dutiable purposes under any of these acts?

Even before the first of these conflicting decisions was rendered the Act of 1883 was repealed.

The McKinley law, enacted October 1st, 1890, reads as follows:

U. S. Statutes at Large, Vol. 26, p. 567.

Passed October 1st, 1890.

Page 585.

242. Leaf tobacco, suitable for cigar wrappers, if not stemmed, $2 per lb. Provided, that if any portion of any tobacco imported in any bale, box or package, or in bulk, shall be suitable for cigar wrappers, the entire quantity of tobacco contained in such bale, box or package, or bulk, shall be dutiable; if not stemmed, at $2 per lb.; if stemmed, at $2.75 per lb.

243. All other tobacco in leaf unmanufactured and not stemmed, 35c. per lb.; if stemmed, 50c. per lb.

Can any one doubt, upon reading it, that the framers of that law knew of the contentions of the

importers under the Act of 1883, as shown in the cases above cited?

Can any one doubt the purpose of that act to reach every pound of leaf tobacco imported, suitable for cigar wrappers, and tax it at the high rate?

Can anybody doubt the purpose of the framer of that law to force importers back to the method of packing the different grades separately, as had been done prior to the passage of the Act of 1883? Back to the old-time honest way of packing instead of the evasive methods resorted to since the passage of the Act of 1883.

Let it be remembered also, when we invoke the aid of acts in *pari materia* in construing the Dingley bill, that the McKinley bill of 1890 and the Dingley bill of 1897 are the bills prepared and enacted by the Republican party with views and purposes very different from the intervening act of a Democratic Congress, passed in 1894, known as the Wilson bill; and that no Republican tariff measure ought to be emasculated by making it dependent for its construction upon the construction placed upon Democratic tariff measures. It undoubtedly had a different theory as its basis, a different motive in its framing, and should have a different rule for its interpretation and enforcement. The McKinley bill taxed every imported leaf of tobacco suitable for cigar wrappers, unstemmed, at $2 per lb. wherever found. That was its plain purpose. So plain that there was no evading it. Its framers knew the importers' trick of mixing grades, and the act provided that if any portion of any tobacco in any bale, box or package, or in bulk, was found suitable for cigar wrappers, the entire quantity should be taxed as wrapper.

Here we have the Republican animus. So distinct that Judge Coxe, in the only case which arose

under the McKinley law, pronounced the language to be too plain for argument.

> Stachelburg *et al. v.* U. S., 72 Fed. Rep., 50. Decided Feb'y 12th, 1896.

Nor did the General Appraisers, in construing the McKinley act, find any excuse for displaying their perpetual infatuation with the bale as a unit. The language of the McKinley act was:

> "If *any portion of any tobacco* in any *bale, box or package, or in bulk*, shall be suitable for cigar wrappers, the entire quantity of tobacco contained in such *bale, box or package, or bulk*, shall be dutiable."

In the face of that language the opinion delivered in this case says, speaking of the McKinley act: "The bale or package being still regarded as the unit, or an entirety, for tariff purposes."

It is respectfully submitted that no such deduction can be legitimately drawn from the language quoted. All that can be said is, that wherever tobacco, suitable for cigar wrappers, formed a portion of any mass imported as an entirety, the whole should be classified as wrapper tobacco. For convenience of description it referred to bales and packages. It also referred to boxes and bulks. Why were bales or packages made the unit, by this reference, any more than boxes or bulks of tobacco? Yet, to carry out their theory, the General Appraisers seized on the references to tobacco in bales and packages, and ignored the reference to tobacco in boxes or in bulk.

Again, in order to maintain its untenable theory, the Board of General Appraisers said:

> "Congress seems to have dealt with tobacco importations upon the theory that a margin of fifteen per cent. would be just and ample."

Is that true of the McKinley bill? Certainly not.

In the light of the McKinley bill, is it not loose talk, indulged in to bolster up a false theory? We shall see when we come to consider the other acts.

The Republicans, the high tariff party, were defeated in 1892.

The Democrats, the low tariff or "tariff for revenue only" party, regained control in Congress. The Congress of 1893-5, under the leadership of Mr. Wilson, enacted a new tariff law August 28th, 1894.

The provisions of that act, bearing upon leaf tobacco importations, were as follows:

WILSON BILL,

U. S. Stat. at Large, Vol. 28, p. 509,

August 28th, 1894.

Page 522.

184:

Wrapper tobacco, unstemmed, imported in any bale, box, package or in bulk, $1.50 per lb.; if stemmed, $2.25 per lb.

185:

Filler tobacco, unstemmed, imported in any bale, box, package or in bulk, 35c. per lb.; if stemmed, 50c. per lb. Provided, that the term wrapper tobacco, whenever used in this act, shall be taken to mean the quality of leaf tobacco known commercially as wrapper tobacco.

Provided further: That the term filler, whenever used in this Act, shall be taken to mean all leaf tobacco unmanufactured, not commercially known as wrapper tobacco.

Provided further: That if any leaf tobacco, imported in any bale, box, package or in bulk, shall be growth of different countries, or shall differ in quality or value, same as provided in the succeeding provision, then

the entire contents of such bale, box, package or in bulk, shall be subject to the same duty as wrapper tobacco.

Provided further: That if any bale, box, package or bulk of leaf tobacco, of uniform quality, contains exceeding 15% thereof of leaves, suitable in color, fineness of texture and size for wrappers for cigars, then the entire contents of such bale, box, package or bulk shall be subject to the same duty as wrapper tobacco.

Provided further: That collectors shall not permit entry to be made, except under regulations to be prescribed by the Secretary of the Treasury, of any leaf tobacco imported in any bale, box, package or in bulk, unless the invoices covering the same shall specify in detail the character of the leaf tobacco in such bale, box, package or in bulk, whether wrapper or filler tobacco, Quebrado, or self-working bales, as the case may be. . . . . .

1864:

Tobacco, manufactured or unmanufactured, of all descriptions, not specially enumerated or provided for in this act, forty cents per pound.

For the first time a tariff statute described wrapper tobacco "*eo nomine*." It was the first enactment on the subject since the decision of the Supreme Court in Falk *v.* Robertson, *supra*, had given a judicial interpretation of the meaning of the term "wrappers," viz., "leaves suitable for the outside finish of a cigar." The proviso declared that the term wrapper tobacco meant the quality of leaf tobacco, *known commercially* as wrapper tobacco. As the Supreme Court had held that the commercial meaning of the term, wrapper tobacco, was "leaves suitable for the outside finish of a

cigar," it is demonstrated that by the Wilson act the tax was imposed as follows:

184.

> Leaves suitable for the outside finish of a cigar, unstemmed, in any *bale, box, package* or *in bulk*, $1.50 per lb.; if stemmed, $2.25 per lb.

One would think this language too plain to admit of any doubt. *Leaves* were the subject of taxation. If they were suitable for the outside finish of a cigar, they were to be taxed. It made no difference where they were found, or whether in bales or boxes or packages or in bulk. As to this character of leaves, there was no qualification concerning their being packed separately or with leaves of another character, and there was no sort of reservation omitting such leaves when discovered because the per cent. of tobacco of another quality with which they might happen to be found commingled was large or small.

They were taxed, whether in bales, boxes, packages or in bulk, and whether commingled or not commingled with leaves of a different character.

Says Black, p. 85:

> "Words should never be *supplied* or changed in a statute unless to effect a meaning clearly shown by the other parts of the statute, *and to carry out an intent somewhere expressed.*"

Lam *v.* Schomp, 20 N. Y. Eq., 82.

It is as untrue of the Wilson bill as it is of the McKinley bill, that in levying a duty upon leaves suitable for the outside finish of a cigar, Congress proceeded upon the theory that a margin of fifteen per cent. of such leaves might be ignored or overlooked.

No margin of *such leaves* was ignored or overlooked, whether they were found in a bale, in a box, in a package, or in a bulk, or whether they were found commingled or not commingled with others.

Herein was the difference between the McKinley Act and the Wilson Act, and the Act of 1883. In the Act of 1883 the determination whether leaf tobacco fit for wrappers should be classified for taxation at the high rate or the low rate was made dependent upon the question whether 85% of the bulk in which it was shipped was of the requisite size, &c. That necessitated considering such leaves as part of a mass of which they were a component part, and involved the ascertainment of some unit whereof they constituted a per cent.

No such reservation is made in the McKinley or the Wilson Acts. In both Acts, "leaves suitable for the outside finish of a cigar," are taxed whenever imported, and however imported, and whether imported separate or in association with tobacco of a different grade. To hold otherwise is to violate the cardinal principle of Statutory Construction last cited, and to supply words to the statutes not called for by any meaning or intent shown elsewhere in the statute.

It is true that the Wilson bill relaxed the rigor of the McKinley bill somewhat in respect to other tobacco than wrapper tobacco. But the modification relates to other tobacco exclusively, and does not refer to wrappers.

The act contained a proviso that if any bale, box, package, or bulk of leaf tobacco of uniform quality contained, exceeding 15% thereof of leaves suitable in color, fineness of texture, and size for wrappers, *then the entire contents* should be subject to same duty as wrapper tobacco.

The McKinley bill had provided that if any portion of any tobacco imported in any bale, box, or

package, or in bulk, was suitable for cigar wrappers, the entire contents should be dutiable as wrappers.

The amendment of this in the Wilson bill did not impose the higher rate on the entire contents, unless the proportion of wrappers exceeded 15% of the bale, box, package or bulk. If the wrappers did exceed 15%, then *the entire contents* should be subject to the *same duty as wrapper tobacco.*

Did this release wrappers from wrapper tax if they did not amount to 15% of the contents? By no means. The tax on wrappers was fixed whether they amounted to 1% or 100% of the contents. It was only the tax on the other tobacco which was affected by the proviso which allowed a certain amount of wrapper in the bale, without subjecting the whole bale to the wrapper rate. It was not the object of the proviso to release any wrapper tobacco from taxation under any conditions, but to modify a penalty theretofore placed upon other tobacco, under certain conditions, by reason of its being packed with wrapper tobacco.

There was a reason for this modification; and it was not a reason which appealed for any release of tax on any per cent. of wrapper tobacco wherever it might be found. The concession based upon the idea that there was no fraud and no impropriety in admitting wrappers packed with fillers, where the wrappers did not exceed 15% of the entire contents.

That such was the reason of the modification is shown by the next proviso of the Wilson Act.

That proviso required special entry under treasury regulations, and that the invoices of leaf tobacco should specify in detail when Quebrados, or self-working bales were imported. Quebrado is simply torn leaf. A self-working bale is a bale of tobacco so packed that it may be sold to the cigar-maker, and he may take it to his shop and upon opening it find in it about the requisite proportions

of wrapper and filler.—Synopsis of Treasury Department, 15,586 G. A. 2846, Dec. 27th, 1894. The proportion of weight of wrapper to filler in a manufactured cigar is something less than 15%.

The small dealer finds it more convenient and within his means to buy these self-working bales, than to buy a bale containing nothing but wrappers, for the working up of which he would be compelled to buy at least seven bales of fillers. Such packages are of no importance to large concerns, but are put up for petty cigar manufacturers, and are a great convenience to them.

The appeal of these small dealers evidently had its effect with the framers of the Wilson law. With invoices specifying in detail the per cent. of leaf tobacco and tobacco of other grades in the self-working bales, the Government could secure its revenue on the wrapper tobacco contained in such bales, packages, boxes or bulks, and at the same time make itself popular with the large class of small dealers. The Wilson law limited the per cent. of wrappers in such bales to 15%, because that per cent. of wrapper was a liberal per cent. to allow for the manufacture of the remaining 85% of the package into cigars. The presence of a greater per cent. of wrappers in such self-working bales would be *prima facie* evidence that the wrappers in the bale, package, box or bulk were being brought in, not for the *bona fide* purpose of working up the fillers in that bale, but for use with other fillers.

Here we have a reason for this modification of the McKinley law by the Democrats in the enactment of the Wilson law. Even the Democrats have always admitted that cigars are a luxury, and that high tariff on cigar wrappers is a legitimate tax from which to raise revenue. Not a word appears in the Wilson bill releasing from taxation a pound of any per cent. of imported wrapper tobacco, wherever it may be found, or however it

may be imported. The only modification of the McKinley law, intented or enacted, was a waiver of the wrapper rate upon *other* tobacco packed with wrappers, unless the wrapper exceeded 15% of the package.

Yet this plain provision has been perverted by the reasoning of the Board of General Appraisers into an exemption from wrapper rates of wrapper tobacco packed with other tobacco, unless the wrappers in the package amount to 15% of the package.

If this is not supplying words and changing words in the statute it is nothing.

The Wilson bill passed August 28th, 1894. As early as December 27th, 1894, in the matter of Garcia & Co. (Synopsis of Dec., 1895, 15,586, G. A. 2,846) the General Appraisers considered the effect of Section 184 of the Wilson bill.

Three bales of tobacco had been imported while the McKinley bill was in force in June, 1894, and the Board of Appraisers had classified them as wrapper. They were then exported and re-entered September 1st, 1894. The Board found, as a question of fact, that self-working bales meant "such a bale as would furnish sufficient wrappers to work up the bale, using the remainder for filler." Speaking of such, it said: "These, although not commercially wrapper bales, if manufactured in their fresh condition, would produce a good percentage of wrappers."

Calling attention to the fact that between June, the date of the original entry, and September, the date of the re entry of the tobacco, the Wilson bill had gone into effect, wherein paragraph 185 enacts that "wrapper" tobacco should be taken to mean *the quality of leaf* tobacco *known commercially* as "wrapper," the Board conceded that the same merchandise, *under trade testimony*, might be properly classified differently under the two acts.

The Board apparently ignored the judicial ascertainment in Falk *v.* Robertson of the commercial meaning of wrappers (137 U. S., p. 231). The proviso says wrapper tobacco shall be taken to mean that *quality of leaf tobacco* known commercially as wrapper tobacco. The term "wrapper" was used for the first time in any tariff act by the Wilson bill, after the decision of Falk *v.* Robertson, and manifestly intended to adopt not only the term "wrapper," as used in that decision, but the commercial meaning of the term as it was defined by that decision.

What was "*the quality* of leaf tobacco known commercially as wrapper tobacco?" The Supreme Court had said in Falk *v.* Robertson:

"'Wrappers' are leaves suitable for the outside finish of a cigar," and declared such was the quality of leaf tobacco known commercially as wrapper tobacco, in the market.

The Board of General Appraisers were not, therefore, at liberty to introduce "trade testimony" to vary this definition. The language of the Wilson bill was the same as if it had read, "Leaves suitable for the outside finish of a cigar, unstemmed, imported in any bale, box, package, or in bulk, $1.50 per lb.; if stemmed, $2.25 per lb."

Upon the question of fact, and upon the testimony of skilled witnesses, two bales were held not to contain "that quality of leaf tobacco known commercially as wrapper." This ruling is unintelligible in the absence of the testimony, for these identical three bales had been held by the same Board June 13th, 1894, to be wrapper.

Concerning the third bale, the decision rendered seems even more fantastical.

The General Appraisers said they must give force to the fourth proviso of paragraph 185 of the Wilson Act. They speak of the fourth proviso as following the other proviso which they had referred

to. The Board had discussed the first and second provisos relating to "wrapper" and "filler." A *third* proviso declared that leaf tobacco imported in any bale, box, package, or in bulk, grown in different countries, or *differing in quality* and value, save as provided in the fourth proviso, should be subject to wrapper duties.

The *fourth* proviso imposed the wrapper rate upon the whole of any bale, box, package, or bulk, of leaf tobacco, of uniform quality, containing exceeding 15% of leaves of suitable color, fineness of texture and size for wrappers.

Now, the fourth proviso does not follow the proviso discussed by the Board, and, in the absence of the testimony, it is impossible to speak with certainty of the conclusions reached about the third bale.

The Board held it subject to the same duty as wrapper tobacco, *notwithstanding the fact that the evidence tended to show that this bale did not contain leaf tobacco known commercially as "wrapper tobacco."*

It is easy to see how the Board reached this conclusion if it was proceeding under the third proviso; the one that follows the other proviso. Under that it might have found that the tobacco in the bale was the growth of different countries, or differed in quality and value, and so was subject to wrapper rates, although not wrapper tobacco.

But the Board says: "In view, however, of the *fourth* proviso of said paragraph 185, to which force must be given to render the whole paragraph operative, and which follows the other proviso named above, and under all the testimony hereinbefore referred to, we find that bale 172 comes within the terms of said last mentioned proviso, and hold that it is subject to the same duty as wrapper tobacco, notwithstanding the fact that the evidence tended to show that this bale did not contain leaf tobacco known commercially as wrapper tobacco."

If the Board was indeed proceeding under proviso four, it must have found that the bale contained exceeding 15% of "leaves suitable in color, fineness of texture and size for wrappers for cigars," and that these were not "leaf tobacco known commercially as wrapper tobacco." This is an absurdity on its face, and in the teeth of the decision in Falk *v.* Robertson, *supra*, which declared the commercial meaning of wrapper tobacco to be "leaves suitable for the outside finish of a cigar."

The only sensible solution of the ruling is that the Board referred to proviso three, "which follows the other proviso" discussed by the Board.

The next ruling of the Board of General Appraisers upon the Wilson Act was made January 23d, 1895 (Synopsis 15,692, G. A., 2,873).

The El Paso Cigar Manfg. Co. imported certain leaf tobacco, unstemmed, October 6th, 1894, from Mexico through El Paso. The Collector examined a bale. 4% was found suitable for wrappers, and so rated. This was conceded to be a fact by the importers. The tobacco was conceded to be of uniform quality. The Collector held that wrapper tobacco was "dutiable, at such rate, wherever found in any quantity," and that "any bale containing wrapper tobacco in appreciable quantities, as in the case submitted, must be assessed at the rate determined in paragraph 184 for the wrapper contents." This was the correct construction of paragraph 184. But it was rejected by the Board as "ingenious."

The argument of the Board sustaining its contrary ruling was not ingenious, and was and is fallacious in its every branch.

Says the Board: "It is substantially a contention that, although there is no actual separation of the tobacco, it may be constructively separated by mentally grouping all the higher-grade tobacco into one lot, and all the lower-grade tobacco into another,"

and then jumps to the false conclusions that because this could not be done under the statute of March, 1883, it could not be done under the Wilson Act. This is a *non sequitur*. The absurdity of such conclusion appears by the attempt at demonstrating its correctness.

Says the Board: "Where, under the law, a percentage is to be calculated, there must be a unit on which the calculation is to be made." That is true, but where is any percentage to be calculated on *wrapper* tobacco under the Wilson law? And what unit must be referred to on which to make the calculation touching wrapper tobacco, under the Wilson law? There is none. There can be none. The language is, 184: "Wrapper tobacco, unstemmed, *in any* bale, box, package or in bulk, $1.50 per lb."

The words were equivalent by judicial determination to—

184:

> Leaves suitable for the outside finish of a cigar, unstemmed, in any bale, box, package or in bulk, $1.50 per lb.

The language made leaves the unit, their suitableness for the outside finish of a cigar the criterion, of the duty to be imposed; and leaves thus found were subject to the duty in any bale, box, package or in bulk, or howsoever they might be packed. Not a syllable in the Statute anywhere omitted any leaves of this sort, wherever they might be found, from payment of wrapper duty. The only reference thereafter in the act to wrappers, is to exempt fillers from the wrapper rate, when packed with not exceeding 15% of wrappers. This does not exempt wrappers from wrapper duty when found packed with more than 85% of fillers.

To so hold is to convert what was granted as a shield to fillers into a sword for wrappers. It is to declare 15% of wrappers exempt, by implication,

under certain circumstances, in the face of paragraph 184, which taxes all wrappers found *in any* bale, box, package or in bulk.

The statement that in the Blumlein case the Court held that the bale was a unit, under the law of 1883, has no bearing upon this question, and is calculated to mislead; and equally irrelevant was the statement that in that case, in construing the law of 1883, the Court held that duties could not be assessed according to the proportions of different qualities found in an entire lot.

The Act of 1883, in its method of ascertaining and reaching wrappers, was not analogous to the Wilson law. In the Act of 1883, the question whether leaf tobacco was to be rated high or low for taxation was made dependent upon whether 85% of the bulk in which it was imported was of requisite size and fineness to be suitable for wrappers. If 85% was of such size and fineness, then *the bulk was classed as other tobacco.* It all depended upon a per cent. in a bulk. The act did not define "wrapper" or "filler." It did not tax leaves of a designated quality wherever found, and in *any* bale, box, package, or in bulk, as wrappers. It determined the classification of a mass of leaf tobacco as an entirety by the per cent. of one grade or another found in it. This feature of the Act of 1883, and this alone, gave color to the never clearly-settled ruling in the Blumlein case, that under that particular act the bale was the unit, and that the constituent elements of the bale could not be separated for rating of taxation by mentally grouping the higher grade in one lot and the lower in another.

If that argument was applicable to the Wilson act, what was the sense of the requirement in proviso five that invoices should specify in detail the character of the leaf tobacco in such bale? * * * whether wrapper or filler tobacco, Quebrado, or "*self-working bale.*"

Why was a self-working bale, known as it is to contain both wrapper and filler, to be entered, with specification in detail, in the invoice of the character of tobacco it contained, unless it was to be taxed, so much as wrapper, so much as filler. Is it credible that the law intended to admit up to 15% of wrapper tobacco in all such bales, tobacco sufficient to work up the whole bale into cigars, and to allow it, although its character was specified in detail in the invoice, to pay only the filler duty?

It is incredible that such was the purpose. Why, under such a construction the importers need never pay another dollar of duty on wrapper tobacco. The 14½% of wrapper, admitted in every self working bale, was sufficient to work up all the filler in the bale. The argument that only 4% of wrappers was in the bale is of no weight. The principle is the same whether the per cent. was 4 or 14.

If, because the wrapper tobacco in the bale is less than 15% of its contents, it is admitted as filler, the revenue of the Government on leaf tobacco is gone. The importer having established the principle on the small per cent. will increase his per cent. to its highest limit and need pay no more wrapper duties.

The construction is fatal to revenue.

Says Maxwell:

> "A construction which facilitates the evasion of a statute will be avoided."
>
> Maxwell Interp. of States (1896), p. 272.

Says Black, p. 27:

> "It is not permissible to construe into nothingness a provision merely because it may appear to work injustice, * * * and still less weight should be attached to the argument from mere inconvenience. * * * The courts have nothing to do with the argument from inconvenience."

Again, says Black, p. 106:

> "It is presumed that the Legislature intends to impart to its enactments such a meaning as will render them operative and effective, and to prevent persons from eluding and defeating them.
>
> "Accordingly, in case of any doubt or obscurity, the construction will be such as to carry out these objects."

The example given by Black was the construction of an act imposing a tax on dividends which placed it in the power of directors to so declare dividends as to escape taxation. That construction was not adopted, the act being reasonably susceptible of another construction, whereby a revenue was secured.

That case was not so flagrant an example of erroneous construction as this.

Surley the Court in that case did not go so far as to characterize the action of the Collector upon the plain language of a mandatory statute as an ingenious method intended for the benefit of the revenue. The ruling of the Board all tends, on the '*argumentum ab inconvenientum*,' to a reduction of the revenue.

I respectfully insist that upon the language of the Wilson Act, especially upon the provisions demanding specifications in detail of the invoices showing which were self working bales, it was the plain purpose to tax wrappers wherever found, and in whatever per cent., and that the proviso touching fillers mixed with wrappers was not intended to release any wrappers, but to penalize fillers for having an admixture of over 15% of wrappers in any mass.

This seems to be too plain for argument. And if this be true, the only way to reach the adjustment of taxation on wrappers and fillers in mixed

bales was by constructively separating the two by mentally grouping them.

They were not taxed collectively upon a classification based on the per cent. of each in a mass, as under the Act of 1883. It was not contemplated by the Wilson Act that they should be actually separated. The contrary was plainly anticipated. And being so, the only way of reaching the result demanded by the detailed specification in the invoices was the way which the Board of Appraisers denied.

The absurd conclusion reached in that case by the Board in its struggle to maintain the bale as a unit under the Wilson law, because it had been held to be the unit under the law of 1883, is not strengthened by the citation of only a portion of what was said by Shiras, J., in Erhardt *v.* Shroeder, in construing the Law of 1883. It is true that he said: "If a bale or other separate and concrete quantity of tobacco contained only leaves of such uniformity of character as to be, in their collective form, of one class, the bale, &c., would be the unit." But why did the Board of Appraisers stop there? His next words were: "On the other hand, if the bale contained tobacco of two classes, the unit would be the ascertained quantity of either class."

Thus we see the Board citing, in support of its idea that the bale is the unit, a decision, the language of which, if it means anything, repudiates the contention of the Board; and quoting only a part of the language used.

Neither the language quoted nor that omitted has any bearing, however, upon the Wilson Tariff Law.

Say the Board of Appraisers, in the El Paso Cig. Mfg. Co.'s case: "It is well known that, in commercial transactions relating to tobacco, the bale is the unit, and the legislation of Congress was made with reference to the fact." Suppose that is true. What does it prove?

Does it follow that because the bale is the *unit of bulk*, it must therefore be, in commercial transactions, or in the contemplation of a tariff law, a unit of *quality?* If so, what is a self-working bale?

The Board of Appraisers themselves announced that there are certain grades, known as "working up stock," the trade term meaning such a *bale* as would furnish sufficient wrappers to work up the bale, using the remainder for filler. Thus we see the instance given by themselves of a unit of quantity which is not a unit of quality.

How would the Board classify such a bale?

It is admitted that the Government is seeking to tax the quality of leaf tobacco known as wrapper at the higher rate. If the sole idea of Congress was with reference to the bale as a unit of quality as well as quantity, the contents of a self-working bale must be unified, although in it wrappers were confessedly packed with tobacco of filler grades, and the law required the fact to be specified in detail in the invoice.

If we enter upon an examination of the quality of the leaves composing its contents, the bale ceases to be a unit for determining the rate of taxation.

To such a bale the language of Shiras, J., not quoted, would beyond doubt apply. "If the bale contained tobacco of two classes, the unit would be the ascertained quantity of each." And if such be the rule, the per cent. of tobacco of the two classes respectively found in a bale, be it large or small, is the true matter to be determined. Each class was taxed by the Wilson bill, according to its quality and the quantity thereof found in the mass examined, subject to the proviso that if the per cent. of fillers was less than 85% of the mass, the fillers should pay wrapper duty.

I have been unable to find that the ruling of the Board, just discussed (15,692), was appealed from, and so far as I can ascertain, this last decision was

the last ruling of the Board or the Courts upon the Wilson bill. The decision of the Board of General Appraisers was manifestly wrong, and has doubtless influenced the Board of General Appraisers in repeating its error in deciding upon the Dingley bill, which is the subject of this appeal. I have dwelt at length upon the decision because I consider a fair presentation of the present case involves a study of every tariff act since the Act of 1883, and the rulings thereunder, upon the subject of wrapper and filler tobacco; and for the further reason that an exposure of the perfunctory consideration given to prior laws and the erroneous rulings of the Board of General Appraisers thereon explains its palpably erroneous decision of the present case.

The Dingley Tariff.

This act was passed July 24th, 1897. The courts, in considering it, have a right to recur to the history of the times when it was passed; the general state of public and legislative opinion of the period; and the occasion of the enactment of the law.

In the case of The People *v.* The Supervisors of Columbia County, 43 N. Y., 130, it was said: "The Court should place itself in the situation of the Legislature, and ascertain the necessity and probable object of the statute, and then give such consideration to the language used as to carry the intention of the Legislature into effect, so far as it can be ascertained from the statute itself." This Court will take judicial cognizance of the fact that the Wilson bill was enacted by a Democratic Congress, and enforced by a Democratic Administration. The theory of the Democratic party was that its tariff measures were enacted for revenue only. This Court will further take judicial cognizance of

the fact that the collections of revenues under the Wilson bill resulted in a deficit, and that the Government of the United States had, during the administration of Mr. Cleveland, been compelled, in order to meet its current obligations and to maintain its Treasury reserve, to issue Treasury bonds. Another political fact which must be considered by the Court is that the Presidential campaign of 1896 turned largely upon the question of what revenue policy should be adopted thenceforth; and that the Republican and Democratic parties respectively were distinctly opposed to each other on this issue. The Republican party advocated high tariff—a protective tariff; the Democracy advocated a low tariff or tariff for revenue only.

The Republican party was restored to power. It elected as President the reputed author of the last Republican tariff measure. The McKinley bill had not only omitted no wrappers from the high rate of taxation, but had imposed wrapper duties upon any bale, box, package or bulk of tobacco, if any portion of any tobacco therein was suitable for cigar wrappers. The Republican Congress was elected in a campaign in which the Republicans advocated, as a protection against the future issue of bonds, the reenactment of a tariff measure substantially like the McKinley protective tariff act, with provisions at least as binding as those embodied in that law.

It fell to Mr. Dingley to offer and control the passage of the new tariff measure of July 24th, 1897.

With these political events fresh in mind it would be absurd to seek for the motive, or the intention of the Republican Congress in the enactment of the Dingley law, by turning to the Wilson law for information and guidance. The plain purpose of the Dingley law was to repeal the Wilson law. While the Wilson law may be said to be an act in *pari materia*, in that it relates to the same

subject of legislation, it can throw no light whatever upon the plan or the motive of the legislation known as the Dingley bill, save that the Court may safely assume that no plan and no motive of Mr. Wilson and his associates was the plan of Mr. Dingley and his associates.

For the purpose of fairly and justly considering the Dingley act, passed July 24th, 1897, we must go back to the last Republican Tariff Act, the McKinley Act, and eliminate from consideration the intermediate measure of the Democracy known as the Wilson bill. It can in no sense be considered as sympathetic with the tariff measures which preceded or succeeded it. It should only be considered, in connection with the tariff policy of the Republican party, as having, in the first place, overthrown the Republican policy; and as having, in the next place, been repudiated by the people when they restored the Republican party to power.

With this clearly in mind, let us examine the terms of the Dingley Act and see if it is true that, in its motive, in its design or by its language it intended to exempt from taxation at the higher rate any wrapper tobacco found in appreciable quanti ties in any package whatsoever. Section 213 of the Dingley Act reads as follows:

> "Wrapper tobacco, * * * if unstemmed, $1.85 per lb.; if stemmed, $2.00 per lb."

Section 214 defines what is meant by wrapper tobacco as that quality "of leaf tobacco which is suitable for cigar wrappers."

Section 213 may therefore be read as follows:

> 213. "That quality of leaf tobacco which is suitable for cigar wrappers, if unstemmed, $1.85 per lb.; if stemmed, $2.00 per lb."

But the act did not stop there. In order to tax the quality of leaf tobacco, Section 214 of the

Dingley bill forbade the entry of any leaf tobacco unless the invoices of the same specified *in detail* the character of such tobacco, whether wrapper or filler, its origin or quality. Specification in detail is not specification in bulk. Specification in detail is a statement of how much of that quality of leaf tobacco in the bulk was tobacco suitable for cigar wrappers, and that quality of leaf tobacco so specified in detail as suitable for cigar wrappers was taxed, if unstemmed, $1.85 a lb.; if stemmed, $2.00 per lb., and no per cent. of it whatever was exempted, wherever it was found or however it might be associated with other tobacco. That this is so is shown by the requirement of Section 214, that the Appraiser should examine at least ten hands in each examined bale, box or package, for the classification of any imported leaf tobacco, and that at least one bale, &c., in every ten, and at least one in every invoice, should be examined. Not a word is said in the statute about exempting any per cent. of wrapper tobacco if the same be found. Not a syllable is uttered about classifying the quality of a given quantity of tobacco, according to the per cent. of one quality or another of tobacco in any quantity as a unit.

In the two cases above cited, decided under the Wilson law (15,586, G. A. 2,846), decided December 27th, 1894, and (15,692, G.A. 2,873), decided January 23d, 1895, the General Appraisers laid great stress upon the fact that the act defined wrapper tobacco as that quality of leaf tobacco *known commercially* as wrapper tobacco, and that in the fourth proviso of Section 185 the language used was, "*If any bale, &c.*, of leaf tobacco of *uniform quality* contains exceeding 15% thereof of leaves suitable, &c., *then* the entire contents, &c., shall be subject to the same duty as wrapper tobacco."

In view of the first definition the Board pointed out that, upon trade testimony, the same mer-

chandise might be classified differently under the Wilson and McKinley Acts by taking trade testimony under the Wilson bill to show that certain bales with wrappers in them did not contain that *quality* of leaf tobacco *known commercially* as wrapper.

Here, again, was an instance of the *trade* swearing away the Government's revenue on wrapper tobacco by establishing that certain bales, although they might contain a percentage of wrappers, were not *bales* of *a quality* of leaf tobacco *known commercially* as wrapper. Proviso fourth of Section 185 of the Wilson bill introduced the excuse for taking a bale as a unit and a uniform quality in the bale as a basis for classification, and Section 184 of the Wilson bill opened the way for *the trade* to testify on the point of what was *known commercially* as wrapper tobacco.

Following up this special pleading the General Appraisers, in deciding the second case (15,692), pinned the Government down to an implied admission that the bales under examination were of *uniform quality;* seized upon the reference to the *bale* in the Wilson Act to declare it the unit; argued that the small proportion of wrapper in the bale showed that the bale was of uniform quality; and declared that such a bale would not be considered commercially as wrapper.

Now, not one of the expressions in the Wilson bill on which these rulings of the Board of General Appraisers are based were re-enacted in the Dingley bill.

All are omitted. In the majority opinion delivered by the General Appraisers, they tell us, referring to another omission, what is to be inferred by such omissions in subsequent enactments. Their statement of the rule is correct, although their particular application of it was erroneous.

They say:

> "The language of that paragraph was not retained in the subsequent act * * * and its omission is plainly significant of the legislative intent to change the law on this particular subject."

Let us apply that principle to these significant changes by the Dingley bill from the language of the Wilson bill.

Bear in mind that the Wilson bill was enacted August 28th, 1894.

That in December, 1894, and January, 1895, it was construed as above by the Board of General Appraisers.

That in November, 1896, a great struggle occurred, involving the question whether the tariff views embodied in the Wilson bill should continue to prevail, or the views embodied in the repealed McKinley bill should be the future policy of the Government.

That McKinley was elected, and the Republican ideas of tariff legislation were committed for formulation into this measure, to Hon. Nelson Dingley, a pronounced high tariff man.

It is fair to presume that in the preparation of the new measure he had before *him* the language of the Wilson Act, and he also had before him the construction which had been placed upon it by these General Appraisers and the courts, and that he called into his counsels his associates familiar with the legislative and judicial history of the subject.

In the light of these well-known facts the Dingley bill should be construed with reference to what of the Wilson legislature it omits as well as with reference to the ordinary grammatical meaning of the language it employs.

Let us examine, then, several material differences between the language of the two acts.

The Wilson bill, Section 184, proviso first, declared: "The term wrapper tobacco * * * shall be taken to mean that quality of leaf tobacco *known commercially* as wrapper tobacco." The Dingley Act says: "The term wrapper * * * means that quality of leaf tobacco which is suitable for cigar wrappers."

Is there any reference to the trade in this language? None. No matter how it may be known commercially, leaf tobacco which is suitable for cigar wrappers is taxed. Where leaf tobacco suitable for cigar wrappers was imported, it was to pay, and no trade experts were to determine whether it was "known commercially" as wrapper tobacco, because of its appearing in large or small proportions in a bale, or by itself or packed with other tobacco. The omission of the words which opened the way to inquiry about commercial understandings, whether leaves suitable for cigar wrappers were or were not wrappers, was intentional, beyond question. The language was, and is, "Leaf tobacco which is suitable for cigar wrappers, if unstemmed, $1.85 per lb.; if stemmed, $2.50 per lb." There was no qualification that if such tobacco was found mixed or packed with more than 85% of filler, or other leaf tobacco, it was to be treated as filler. It was not even taxed as part of any bale, box, package or bulk in which it might be found. Is not this a significant change?

Again: The Wilson Act, Section 185, proviso fourth, said:

> "If any bale, box, package or bulk of leaf tobacco of uniform grade contains exceeding 15% thereof of leaves suitable, &c., for wrappers for cigars, *then* the entire contents shall be subject to the same duty as wrapper tobacco."

The Dingley bill said:

> "Filler tobacco, when mixed or packed with more than 15% of wrapper tobacco, * * * if unstemmed, $1.85; if stemmed, $2.50."

There is no use of the word "if," or reference to any "bale, box, package or bulk," or to the "uniform quality" of any such bale, box, package or bulk.

All the ifs and buts and doubts about what may be the commercial understanding or the unit are swept away.

Wrapper tobacco is all leaf tobacco suitable for cigar wrappers. Filler tobacco is all other tobacco. The duty on each is defined, and if filler tobacco is found mixed or packed with more than 15% of wrapper, it is taxed as wrapper, whatever may be the mass in which it is mixed. No per cent. of filler is released in any event. In certain events filler pays the high rate, but, wherever found, is taxed. It was not the intention to release any part of it from one rate or the other. Why should it be presumed that it was the intention to release up to 15% of wrapper mixed with filler, when the whole intent shown was to penalize rather than reward such mixture.

The men who framed the law were seeking to tax that quality of leaf tobacco which is suitable for cigar wrappers at the designated rate of taxation, or at the high rate of taxation, wherever found, and in whatever quantity found, exactly as McKinley had done in the last Republican measure before it was repealed by the Wilson Act. This seems too plain for argument.

Says Black, p. 18:

> "It is but a corollary to the general rule in question that nothing is to be put to or to

be taken from a statute, unless there are similar adequate grounds to justify the inference that the Legislature intended something which it omitted to express."

And the same authority, at p. 72, says:

"It is to be taken as a fundamental principle, standing, as it were, at the threshold of the whole subject of interpretation, that the intention of the Legislature is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter as to its wisdom or justice. If the language admits of no doubt or secondary meaning, it is simply to be obeyed without more."

Says Maxwell, on Interpretation of Statutes, 1896, p. 3:

"The first and most elementary rule of construction is that it is to be assumed that the words and phrases are used in their technical meaning, if they have one, and in their popular meaning, if they have not, and that phrases and sentences are to be construed according to the rules of grammar; *but from this prescription it is not allowable to depart where the language admits of no other meaning.* * * * If there is nothing to modify, nothing to alter, nothing to qualify the language which the statute contains, it must be considered in the ordinary and natural meaning of the words and sentences."

And again the same author says, on p. 4:

"Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous."

And again, at page 5, it is said:

> "However unjust, arbitrary or inconvenient, the intention conveyed may be, it must receive its full effect. * * * The duty of the Court is not to make the rule reasonable, but to expound it as it stands according to the real sense of the words."

Applying the above unquestioned canons of construction to the Dingley Tariff Act of 1897, how can it be said with any sort of support from the language of the Dingley or the McKinley Acts, as is said in the opinion in this case by the Board of General Appraisers, that "Congress seems to have dealt with tobacco importations upon the theory that a margin of 15% would be just and ample."

The McKinley bill allowed no margins of any per cent., and, in the Stachelburg case, the only case arising under it, Judge Cox declared the language of the McKinley bill was too plain for argument.

In the next Republician measure, to wit, the Dingley bill, not a word is said as to any per cent. exemption of that quality of leaf tobacco which is suitable for cigar wrappers, and yet we have lugged into this decision of the General Appraisers the idea that Congress seems to have dealt with tobacco importations upon the theory that a margin of 15% would be just and ample.

Let us see on what penumbra this erroneous theory of the Board of Appraisers is based. In the McKinley bill, so keen was the search of the Republican policy for leaves fit for wrappers on which to place the high tax that if any leaves fit for wrappers were found commingled with leaves of filler grade, or other quality of leaf tobacco, the whole bulk was at once treated as wrappers, and taxed accordingly.

Why was this? Because, in the first place, the Supreme Court had declared that, prior to the en-

actment of these revenue measures, it had been the custom to pack leaf tobacco and tobacco of the lower grades in separate packages, and there was no good reason for commingling them after the passage of the tariff acts, except with a view of evading the revenue. In the next place, it was the policy of the Government to compel importers to keep the grades separate, so as to make their classification for taxation easy and convenient, without imposing any real inconvenience to the importers. And, in the next place, it was the purpose of the McKinley bill to avoid a condition of packing which would lead to such conflicting irreconcilable decisions, growing out of a calculation of per cent. of the one grade or the other present in a package, as had resulted from the peculiar phraseology of the Act of 1883. All these considerations led to the bold course of the McKinley bill, whereby the entire bulk of every package in which there was any wrapper tobacco, was taxed at wrapper rate.

When the Republican party was restored to power, it found that the Democrats had so modified the McKinley Act as not to tax the entire package at the wrapper rate, unless it contained over 15% of wrapper tobacco. It is by no means certain that even the Wilson bill intended, where a bale contained 14% of leaves suitable in color, &c., for wrappers, and 86% of leaves not so suitable, to permit the 14% of wrapper leaves to escape the higher rate of tax.

I think I have demonstrated that such was not the purpose of that act; that in such case the true construction would have been to tax 14% as wrappers and 86% as fillers. Still the language of the proviso of Section 185 of the Wilson Act was peculiar in that it said "that if any bale, &c., *of uniform quality contains*," &c.

When the Republican party was restored to power, it found that a construction had been

placed upon the Democratic measure such that it admitted bales containing 85% or more of filler tobacco without penalizing them for having wrapper tobacco, 15% or less, associated with filler, and taxed the wrapper as filler.

I have already explained why such a provision might be reasonable in the case of self-working bales. The Republican party, in a modified way, continued this provision. It did not, however, adopt the bale as a unit, nor did it introduce the factor of uniform quality in the bale, box, package or bulk. The whole enactment was as follows:

> Section 213. "Filler tobacco, when mixed or packed with more than 15% of wrapper tobacco, if unstemmed, $1.85 a lb.; if stemmed, $2 per lb. Filler tobacco, not specially provided for in this act, if unstemmed, 35c. per lb.; if stemmed, 50c. per lb."

This language seems too plain for discussion. It has no reference whatever to a tax on wrapper tobacco. It relates entirely to a tax on filler tobacco. One class of filler tobacco is specially provided for, to wit, if it is imported mixed or packed with more than 15% of wrapper tobacco, it (the filler tobacco) must pay the wrapper rate, and all other filler tobacco is to pay 35c. a lb. if unstemmed; 50c. per lb. if stemmed.

What could be plainer? This language does not release any wrapper tobacco wherever it is found. It only defines the duty on filler tobacco. It imposes the higher rate upon it unless it amounts to 85% or more of the tobacco with which it is mixed or packed, and if it amounts to 85% of the tobacco, with which it is mixed or packed, it pays 35c. One would think the language so plain as to require no discussion and an argument which seeks to deduce from this language an exemption of wrapper tobacco to the extent of 15 pounds in a hundred,

surely sounds like an effort to import into a statute language which is not there, and a meaning which the words of the statute do not fairly convey.

I have already quoted two authorities upon the point that the construction which facilitates the evasion of a statute should be avoided, and that in construing the statute it is presumed that the Legislature intends to impart to its enactments such a meaning as will render them operative and effective, and will prevent persons from eluding or defeating them.

A word upon that subject. In the decision of this case, the Board of Appraisers, in the majority opinion, has gone out of its way, as it seems to me, to argue in behalf of the idea that Congress intended to take no notice of small quantities of wrapper tobacco, where such tobacco was found in bales. That idea is certainly not justified by any language of the Dingley Act. The Dingley law entirely omitted the idea of the bale, the box, or the package, or the "uniform quality" of the contents of any bulk. It taxed wrapper tobacco, and did not omit from that tax any per cent. of wrapper tobacco, either 1% or 10% or 15% when found. To have done so would have been to open the door to fraud upon the revenue to be derived from wrapper tobacco. It is true that the Board of General Appraisers allowed witnesses to appear before it who testified that *generally in large tobacco and cigar factories* no quantity of wrapper tobacco (ordinarily packed in a commercial bale) less than 5% *is commonly segregated* or used for wrappers. We are told also that it is not profitable to separate and utilize it. Some witnesses (presumably representatives of large tobacco and cigar factories) put the quantity as high as 10% or 12%, and others as high as 15%. We are also informed that it is alleged that no quantity less than that specified by the witnesses respectively is capable of profitable utilization by dealers

and makers. It will be observed that this computation relates to *large tobacco and cigar factories.* It is not alleged to apply to the class of small makers who prefer to buy and handle self-working bales. With the large capital of large tobacco and cigar factories, they undoubtedly buy large quantities of tobacco. One bale of wrappers to about seven of fillers. They undoubtedly buy high grade clean wrappers, with an unappreciable admixture of fillers. They undoubtedly buy fillers packed with the least per cent. of wrappers, because they are seeking in their filler bales only fillers, and the presence of wrappers to an appreciable per cent. in filler bales adds nothing to their stock, unless they go into a separation of grades, and tends rather to enhance the price of the filler bale. They may well, therefore, say that no quantity of wrapper tobacco ordinarily found in their filler bales is commonly segregated or used for wrappers *in large tobacco and cigar factories.* But note that this relates to *large tobacco* and cigar factories; and observe that some of these witnesses, representing even this class, place the per cent. worth searching for in such bales as low as 5%. Whatever men of this class, or men testifying about the usages of large tobacco and cigar factories, may say, the statement is not applicable to the case of small dealers. There is not a small dealer in America who would not rather buy a filler bale with 15% of wrappers in it, than buy a bale of pure fillers without any admixture of wrappers. It pays such dealers to search out and separate the leaves suitable for wrappers, and to utilize them in their small dealings. They will look for them down to 2% or 3% of the contents in such bales, as may be seen by the examination of their product. Thus we have a large class of dealers in imported leaf tobacco, whose wants of wrapper are supplied by a bale of fillers containing much less than 15% of wrappers.

The authorities which I have cited declare that a construction which facilitates the evasion of a statute will be avoided, and that "it is presumed that the Legislature intends to impart to its enactments such a meaning as will render them operative and effective, and to prevent persons from eluding and defeating them."

This is not good law if the construction placed upon this Dingley bill by the Board of General Appraisers is correct. If it were allowed to stand, a large class of people using imported leaf tobacco can, and would, buy all the wrappers they need, and manufacture all the cigars they could, without paying one dollar duty on wrapper tobacco. It is an undisputed fact that the wrappers do not amount to exceeding 15% of the tobacco in a cigar.

Such a construction was an outrage upon the legislative branch of the Government, and imports into the statute a meaning nowhere discoverable in its language, or in the purpose of the framers of the law.

But this is not the worst result of this argument of inconvenience set up by the Board of Appraisers. They have fallen into a trap prepared for them by the importers and the representatives of large tobacco and cigar factories. Under the specious plea that Congress intended to ignore and take no notice of a little per cent. of wrappers found in a bale; and in a case where the actual per cent. of wrappers present is but 3% or 4%; the Board of Appraisers, as if opposed to a cold close search for protective revenue, have said, in the face of the unqualified language of the Dingley bill, that wrapper tobacco found mixed or packed with filler or other tobacco shall not pay wrapper duties, but shall pay filler duties, unless it amounts to more than 15% of the bulk in which it is mixed or packed. As I view this, it is a wrong upon the Government. True, they say it is an insignificant

matter. They pooh pooh the idea that the Government intended to lay the higher rate of tax upon so small a per cent., and when a faithful Collector found this small per cent., identified it, and would have collected the tax upon it, as the law directs, these gentlemen pooh poohed this performance of his plain duty and characterized his action as "an ingenious idea for the raising of revenue." Raising revenue has been the ingenious idea of Republican legislation throughout the history of the party, and denunciation of the ingenuity of the Republican party in raising revenue has been the constant capital of its defeated rival political organization. This is a political fact which should be borne in mind against an ingenious and evasive construction of this Dingley Act. But what shall be said of the "ingenuity" of those who construed this act in such wise that, if their construction were correct, it would put an end to the revenues of the United States at the higher rate of duty from the quality of leaf tobacco fit for use as wrappers for cigars. They rendered a decision which would tax wrappers as fillers, unless they amount to over 15% of the bulk of tobacco with which they are mixed or packed, because they were convinced by the testimony of certain witnesses that it does not pay to separate any quantity of wrapper tobacco in a commercial bale where it amounts to less than 5%; that it is not profitable in such case to separate and utilize it; some of the witnesses saying that in large tobacco and cigar factories such a small per cent. of leaf is not customarily segregated and used for wrappers. True, they said some others place the quantity as high as 10% and 12%, and others as high as 15%. But note that none of this class of swift witnesses of special interests placed the per cent. beyond 15%. If the ruling of the Board of General Appraisers had stood the next importation of filler tobacco would not have contained 3% or

4% of wrappers. It would contain 14½%, nay, 15%. If, according to the ruling of this Board of General Appraisers, there must be more than 15% of wrapper tobacco in the imported mass before it pays any wrapper duty, we would have a re enactment of the methods of the importers, resorted to while the Act of 1883 was in force. They would not lay in the wrappers separately as they did in the Falk case. They would mix them and pack them together. Large tobacco and cigar factories would bring in 15% of wrappers in filler bales, and pay filler duties upon them. None of the witnesses deny that it would pay large as well as small dealers in such case to get out the 15% of wrappers by paying 35c. instead of $1.85 on every 15 lbs. so imported. The importers save $1.50 a lb. on 15 lbs. in every hundred, or $22.50 a hundred on the hundred lbs. of tobacco. The 15 lbs. of wrapper tobacco, thus imported, would be ample to work up the 85 lbs. of fillers. There would be no occasion, even for the large tobacco and cigar factories, to import any wrapper tobacco separately, and the Government would thenceforth receive no revenue upon wrapper tobacco, owing to this absurd construction of the Board of General Appraisers, which facilitates the evasion of the statute and renders the higher rate of tax imposed upon that quality of leaf tobacco suitable for cigar wrappers, both inoperative and ineffectual, and enables persons to elude and defeat the law.

In the argument of this case in the court below, counsel for the importers dwelt, with emphasis, upon the statement that the importers were not packers, and, therefore, did not control or direct the manner in which tobaccos are blended in the bales imported. Theoretically that may be true, but, as a matter of fact, there can be no doubt that bales are packed on the plantations or in for-

eign warehouses, under the direction of, or upon suggestions from, the importers. I need only cite the Falk case as an evidence of what importers do concerning the packing of tobacco. It was further said that Congress never intended to discourage the mixing of tobacco in bales. This is assuredly not true, for the McKinley bill taxed all the tobacco in a bale as wrapper tobacco if any wrappers were found in a bale of fillers.

In the case of Garcia & Co., G. A., 2846, it was said:

> "There are also certain grades of tobacco,
> "known as working up stock, the trade
> "term meaning such a bale as would furnish
> "sufficient wrappers to work up the bale,
> "using the remainder for filler, and these,
> "although not commercially wrapper bales,
> "if manufactured in their fresh condition,
> "would produce a good percentage of wrap-
> "pers."

Thus we see that, by the adjudication of the Board of General Appraisers, these self-working bales do contain, and are known to contain, two distinct grades of tobacco; yet, by the ruling which was sought to be maintained in the court below, if such a bale contained 14% of recognizable wrappers, they would be liable only to tax as fillers; whereas, if it had 16% of wrappers, no more plainly wrappers than those in the bale containing 14%, the wrappers would be taxed as wrappers. What sense is there in contending that an act penalizing fillers for association with over 15% of wrappers, offered a premium to wrappers for such association in a less per cent.? A difference of ½ of one per cent. in such case would make a loss of $22.50 to the Government on wrappers, as plainly wrappers as any other wrappers, when the manifest object of the provision was *not to release wrappers* under

any circumstances, but to penalize fillers for being packed with them.

The substance of the contention of counsel for the importers in the court below was that the language, "And filler tobacco, when mixed and packed with more than 15% of wrapper tobacco," really meant, not only what it said, but must be read as saying, "Tobacco, consisting of over 85% of fillers and less than 15% of wrappers, shall be taxed 35% as fillers."

If that was the intention of the law, why was it not so expressed? Why does it declare that leaf tobacco was of but two kinds, to wit, wrapper tobacco as defined, and then, "Filler tobacco means all other leaf tobacco." *The law defines two grades. The argument calls for three grades,* to wit, wrapper tobacco, filler tobacco *and mixed tobacco.* The first to be taxed high, the latter two to be taxed low. Surely, if that was the intention of the legislators, they would have so expressed it. The statute is too plain for such a contention. It states, in so many words, Section 214, wrapper tobacco is "that quality of leaf tobacco which is suitable for cigar wrappers," and when it is found it taxes it, no matter in what company it may be found. Then it says all other tobacco shall be deemed filler tobacco.

As was truly said by Judge Lacombe, in his decision in the Circuit Court, the percentage system was dropped by the Dingley tariff bill. I do not think any argument could add strength to his paraphrase of Sections 213 and 214 (page 123 of the record).

All of which is respectfully submitted.

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